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## THE STATUS OF THE DIPLOMATIC BAG: A PROPOSED UNITED STATES POSITION

*Major Jeffrey F. Addicott†*

"One good reason is always enough."  
General R. E. Lee

### I. INTRODUCTION

It is an unfortunate fact of the times that diplomatic privileges and immunities have increasingly been subjected to abuse by some states. The protections afforded diplomats, diplomatic missions, and diplomatic bags have been misused to sponsor or commit various criminal acts against other states or their citizens, striking at the heart of traditional concepts of international diplomatic relations.<sup>1</sup>

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1. See generally Goldberg, *The Shoot-Out at the Libyan Self-Styled People's Bureau: A Case of State-Supported International Terrorism*. 30 S. DAK. L. REV. 1 (1984).

Use of the diplomatic bag to import and export prohibited or illegal items into receiving and transit states is of particular concern.<sup>2</sup> Misuse has included transport of illegal foreign currency, illegal drugs, weapons, and even human beings.<sup>3</sup> While all *malum in se* acts that abuse this diplomatic shield are objectionable, most disconcerting are those which use the diplomatic bag to facilitate acts of terrorism.<sup>4</sup> As a result, article 27(3) of the Vienna Convention on Diplomatic Relations (Vienna Convention),<sup>5</sup> which provides that "[t]he diplomatic bag shall not be opened or detained,"<sup>6</sup> has come under the most serious scrutiny and debate.<sup>7</sup> Although the article does not specifically include the term "inviolable," it is apparent that a privileged status has been created that is far superior to traditional diplomatic norms.<sup>8</sup> Concerned individuals and states urge revision of this protected status in order to better protect legitimate security interests of receiving states. Western nations

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2. Under international law a receiving state is one that receives diplomatic materials from a sending state. A transit state can be any state through which diplomatic materials might pass. See Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Vienna Convention], which defines the international conventions for diplomatic intercourse, privileges, and immunities of diplomatic agents.

3. See *Report of the International Law Commission on the Work of its Thirty-Eighth Session*, U.N. Doc. A/41/10 (1986) [hereinafter 1986 ILC Report].

4. There is no universally accepted definition of terrorism, either in the international community or in the United States. As its root word "terror" implies, terrorism involves the use of fear designed to attain certain goals. Notwithstanding that it is the antithesis of the rule of law, the old adage that "one man's terrorist is another man's freedom fighter" contributes to the inability to carve out a clear definition. Certainly, however, Western nations have come to associate certain specific acts as terrorism *per se*. Hostage taking, public bombings, and acts directed against civilians are easily defined as terrorist in nature, regardless of the ideological, religious, or social goals of the perpetrators. For a more detailed discussion of the term, see R. ERICKSON, *LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM* (1989).

5. Vienna Convention, *supra* note 2. The Vienna Convention on Diplomatic Relations was entered into force for the U.S. on Dec. 13, 1972. The U.S. ratification appears at 111 Cong. Rec. 23, 733 (1965).

6. Vienna Convention, *supra* note 2, art. 27(3).

7. See Goldberg, *supra* note 1. See also E. DENZA, *DIPLOMATIC LAW* 4 (1976) for a discussion of difficulties arising because of the approach of inviolability.

8. E. DENZA, *supra* note 7, at 125-26. See also GORE-BOOTH AND LORD, *SATOW'S GUIDE TO DIPLOMATIC PRACTICE* 117 (5th ed. 1979) [hereinafter SATOW].

are particularly concerned with misuse that may facilitate acts of international terrorism. Smaller states are more concerned with misuse that may facilitate disruptive economic or political activities. All states fear that violence resulting from a state-sponsored or state-supported terrorist<sup>9</sup> abuse of the diplomatic bag might precipitate not only the abolition of the diplomatic bag's protection, but also the undermining of other privileges and immunities codified under the Vienna Convention.<sup>10</sup>

This Article examines the current legal status of the diplomatic bag and recent international efforts to re-examine that status. Conflicts between the sending state's interest in ensuring confidentiality of its diplomatic materials and the receiving and transit states' interests in ensuring adequate security will be closely examined. Finally, against the background of the concept of reciprocity, a United States position on the status of the diplomatic bag will be proposed.

## II. DEFINITION OF THE DIPLOMATIC BAG AND ITS CURRENT STATUS

### A. Customary International Law

States have long required a safe and confidential means to communicate with diplomats stationed abroad.<sup>11</sup> Traditionally, receiving states have granted foreign diplomats this privilege in order to receive the same right of free communication. Customary international law identifies two principles which underlie this free communication privilege: no delay and no censorship.<sup>12</sup>

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9. Several commentators seek to distinguish a "state-sponsored" terrorist act from a "state-supported" terrorist act. State-sponsored terrorism exists when a state directly but secretly uses its own resources to sponsor acts of terrorism against another country. Since accountability for such acts is denied, the state seeks to avoid responsibility. On the other hand, "state-supported" terrorism refers to the practice of a state providing resources to a terrorist group for training, logistics, or financing. Under the state-supported scenario, however, the terrorist group generally operates independently from the state. See ERICKSON, *supra* note 4, at 33; FM 100-37 Terrorism Counteraction, 3 (July 1987).

10. See generally Vienna Convention, *supra* note 2.

11. See generally H. GROTIUS, RIGHTS OF WAR AND PEACE (W. Whewell trans. 1853).

12. *Id.*

It is perhaps not too much to say that the privilege of freedom of communication is one of the most vital of those required by and accorded to envoys. It enables them to receive instructions from their sending State and to send home reports of what they have done, said, and observed. The privilege consists of the transmission without delay of the envoy's communications and immunity of those communications from any form of censorship. The communications may be sent by post or telegraph . . . [and] may also be sent by the diplomatic bag by courier; and the courier must enjoy a degree of freedom of movement similar to that of the ambassador himself.<sup>13</sup>

The no delay, no censorship rule extends to the courier as well as to any physical instrument used by the courier. Over time, the preferred instrument has come to be referred to as the diplomatic bag.<sup>14</sup>

Although customary international law did not specifically prohibit inspection or refusal to approve transit of a bag, widespread mutual respect made such occurrences rare.<sup>15</sup> Nevertheless, lack of universal binding rules was unsatisfactory. An early attempt to form international consensus for a multilateral treaty was initiated in 1932 at Harvard Law School.<sup>16</sup>

13. Lyons, *Personal Immunities of Diplomatic Agents*, 1954 BRIT. Y.B. INT'L L. 299, 334 (1954).

14. Some sources refer to the diplomatic bag as the diplomatic pouch. The term diplomatic bag, however, is the description most often seen in practice and literature.

15. E. DENZA, *supra* note 7, at 125-26.

16. 7 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 174-75 (1970). The Harvard Draft Convention on Diplomatic Privileges and Immunities contained the following provisions:

1. A receiving state shall freely permit and protect official communications by whatever available means, including the employment of messengers provided with passports ad hoc and the use of codes and cipher:

- (a) between a mission or the members of a mission and the sending state;
- (b) between a mission or the members of a mission and other officers of the sending state upon the territory of the receiving state;
- (c) between a mission of the sending state and a mission of another state sent to the same receiving state;

Leading international scholars and authorities met to prepare a proposed set of unified rules.<sup>17</sup> The resultant Harvard Draft Convention on Diplomatic Privileges and Immunities (Harvard Convention) stated:

This article is based upon the principle, now generally recognized in practice, at least in times of peace, that universal freedom of diplomatic communications is a matter of interest to the entire community of nations.

International law recognized the principle of freedom of diplomatic communications at a time when the carriage of such communications was made by special couriers furnished with passports ad hoc. While earlier means are still employed, at the present time international official intercourse makes use of whatever means are available: courier, mails, telegraph, telephone, cable, or radio. Modern means of communication having changed the methods of diplomatic intercourse, no interference by the receiving state with the communications of missions . . . is tolerable.<sup>18</sup>

Traditional customary law respected the diplomatic bag but agreed that a receiving state, based on valid suspicion of abuse, could either inspect or return the instrument.<sup>19</sup> The Harvard Convention strongly influenced drafters of the Vienna Convention to grant the diplomatic bag additional protections previously unknown in customary law. The Harvard Research Group's proposal actually reflected a position midway between the customary rules of no delay, no censorship and the greater stan-

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(d) between a mission of the sending state and missions and consulates of the same state in other states;

(e) between a mission of the sending state and the agents of public international organizations,

2. A receiving state shall freely permit and protect communications between a mission or members of a mission of the sending state and the nationals of the sending state within the territory of the receiving state.

3. A state other than the receiving state and the sending state shall protect and facilitate the transit of such communications and messengers engaged in connection therewith.

*Id.*

17. *Id.*

18. *Id.* at 175.

19. E. DENZA, *supra* note 7, at 125-26.

dard of protection ultimately adopted by the Vienna Convention.<sup>20</sup>

### *B. The Standard of Protection for the Diplomatic Bag*

In conjunction with formation of the United Nations and development of closer political and business ties among nations, the international community recognized a need to codify immunities and privileges associated with diplomatic relations. Extensive debate was finally resolved in 1961 with the Vienna Convention on Diplomatic Relations. This Convention was subsequently adopted by a majority of the United Nations member states, including the United States.<sup>21</sup>

Many articles in the Vienna Convention simply codified customary international practices long associated with international diplomatic intercourse. An important provision was added, however, that accorded the diplomatic bag a "more absolute protection than was given under the previous customary law."<sup>22</sup>

The Vienna Convention was based on a *functional necessity* theory, viewing diplomatic privileges and immunities as a means to allow proper day-to-day function of the diplomatic mission and not as a benefit to any individual.<sup>23</sup> Many original commentators and drafters argued that inclusion of the shielding language regarding status of the diplomatic bag strained that analysis.<sup>24</sup> With the bag obtaining a status of near inviolability, concern shifted to the vast potential for widespread abuse.<sup>25</sup> It was argued that any misuse that had occurred

20. M. WHITEMAN, *supra* note 16, at 175.

21. Vienna Convention, *supra* notes 2 and 5. The Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808 (1978), adopted the Vienna Convention as the fundamental law regarding diplomatic privileges and immunities. The Vienna Convention was the first true multilateral agreement on diplomatic immunities and privileges.

22. SATOW, *supra* note 8.

23. See generally C. E. WILSON, DIPLOMATIC PRIVILEGES AND IMMUNITIES (1967). The Vienna Convention certainly envisioned that only those protections that were necessary to perform the functions of the diplomatic mission were to be extended.

24. E. DENZA, *supra* note 7, at 126.

25. See E. CLARK, DIPLOMAT—THE WORLD OF INTERNATIONAL DIPLOMACY 103 (1979). Under customary international law, the major powers did not allow the

under the old customary rules would surely be followed by greater abuse under the more privileged status.

C. *Article 27(3): Functional Inviolability*

Two articles of the Vienna Convention, 27(3) and 27(4), elevate the diplomatic bag's status to near inviolability. While under customary international law the "receiving state had a right to challenge a bag which it believed to contain unauthorized articles,"<sup>26</sup> article 27(3) of the Vienna Convention states that "[t]he diplomatic bag shall not be opened or detained."<sup>27</sup>

Part of this issue of inviolability stems from placement of definitional language within the Vienna Convention. As reflected in the commentary accompanying article 27(4), the International Law Commission consciously elected to place the definitional description of the bag *after* the broad statement of privileged status in article 27(3), further stressing the principle of absolute protection regardless of use.<sup>28</sup> All attempts to place the definitional clause before the status clause were rejected.<sup>29</sup>

Recognition of the customary practice of detaining or inspecting suspicious diplomatic bags can be found only in commentary to articles of the Vienna Convention.<sup>30</sup> Even so, a

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diplomatic bag for personal use. It was, however, widely acknowledged that this was the practice. In Russia in the 1930s, "when luxuries were unobtainable, diplomatic admirers often kept actresses and ballerinas in Paris fashions with clothing brought into the country in the [diplomatic] bag." *Id.*

26. SATOW, *supra* note 8, at 117-18. See also C.E. WILSON, *supra* note 23, at 136-37 (1967).

27. Vienna Convention, *supra* note 2, art. 27(3).

28. See E. DENZA, *supra* note 7, at 126-27. This placement of the privilege section before the content section indicated that the privilege is not conditioned on compliance with content rules.

29. "In 1958 the Rapporteur proposed to the Commission a text which amalgamated the provisions which corresponded to paragraphs 3 and 4 of article 27. The object of this was simply to place the provision which might be said to constitute the definition of the diplomatic bag before the provision regarding its inviolability. This rearrangement was not acceptable to the Commission, since it might be argued from such a juxtaposition that the inviolability of the bag was conditional on its complying with the requirements regarding its contents." *Id.*

30. The commentary to article 21 states:

The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry of Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned.



concept of absolute inviolability is not clearly delineated. Initial formal comments of the United States included the observation that personal baggage of a diplomat can be searched upon serious grounds for "presuming that it contain[ed] articles not intended for his personal use or . . . articles the import or export of which is prohibited by law or controlled by quarantine regulations of the receiving state."<sup>31</sup> This analysis is not generally extended to the diplomatic bag, but Vienna Convention language did not specifically pinpoint the concept of inviolability.

The majority of states, in ratifying the Vienna Convention, readily acceded to the diplomatic bag's new status and the notion that it should not be opened or detained. A minority position argued that language of article 27(3) did not really mean the bag was "inviolable" because the specific term was not included. Countries espousing this position insisted that, as a result, the language used did not prohibit a receiving state from exercising its security interests should the need arise.<sup>32</sup>

Other states, such as Bahrain, rejected the article and the new status entirely, asserting that it was incompatible with customary international law. Bahrain included a specific reservation to article 27(3),<sup>33</sup> retaining the "right to open the diplomatic bag if there are serious grounds for presuming that it contains articles, the import or export of which is prohibited by law."<sup>34</sup> Bahrain felt that protected treatment of the diplomatic bag was not mandatory if reason existed to believe the

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While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 3 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the over-riding importance which it attaches to the observance of the principle of inviolability of the diplomatic bag.

11 Y.B. OF THE INT'L L. COMM'N 138 (1957).

31. C.E. WILSON, *supra* note 23, at 138.

32. E. DENZA, *supra* note 7, at 128.

33. *Id.* See also L. DEMBINSKI, THE LAW OF MODERN DIPLOMACY 178, n. 8 (1988). Kuwait, Bahrain, Saudi Arabia, and Libya each made such a reservation regarding article 27(3) of the Vienna Convention. Although the United States, the U.S.S.R., Australia, and others rejected these reservations, a state is probably legally justified in making such a reservation if it asserts the desire to maintain previous customary practice.

34. E. DENZA, *supra* note 7, at 128.

diplomatic bag contained items either illegal or not for official use.<sup>35</sup>

Indeed, this analysis is included in the Convention on Consular Relations.<sup>36</sup> A consular bag (as opposed to a diplomatic bag) may be opened if authorities of the receiving state have serious reason to believe the bag contains prohibited items.<sup>37</sup> The sending state then has the choice either to open the bag or to have it returned.<sup>38</sup> However, authorities argue this option exists only because of specific treaty provisions on consular relations: "bags of other types of missions (such as diplomatic bags) under no circumstances can be opened, or their contents controlled by authorities of the receiving State."<sup>39</sup>

The International Law Commission has repeatedly rejected proposals dealing with the diplomatic bag that would permit receiving state authorities to impose a *be opened or be returned* choice on sending states.<sup>40</sup> While a sending state does owe a duty to transport only those materials consistent with article 27(4), many commentators maintain that even the "non-observance of that duty . . . [does] not create a right to inspect the diplomatic pouch."<sup>41</sup>

In actual international practice, states generally treat the bag as inviolable, following the clear meaning and spirit of the Vienna Convention. The limited protections available under customary international practices have thus been supplanted by a much more stringent standard that can be termed *functional inviolability*.

#### D. Article 27(4): How Much is Enough?

Only after the diplomatic bag's status is discussed in article 27(3) does the Vienna Convention, in article 27(4), go on to describe just what constitutes the diplomatic bag: "The packages constituting the diplomatic bag must bear visible external

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35. Goldberg, *supra* note 1, at 4.

36. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 [hereinafter Consular Convention].

37. *Id.* at 99, T.I.A.S. No. 6820, at 23, 596 U.N.T.S. at 290.

38. *Id.*

39. See L. DEMBINSKI, *supra* note 33, at 178.

40. E. DENZA, *supra* note 7, at 126-27.

41. *Id.* at 125.

marks of their character and may contain only diplomatic documents or articles intended for official use."<sup>42</sup> Requirements that the diplomatic bag "bear visible external marks" and "contain only diplomatic documents" seldom produce much controversy. The external mark need not even be an official state seal of the mission.<sup>43</sup> What has sparked controversy is the broadly worded phrase "or articles for official use," terminology that can only be defined by reference to actual practice between states. Fortunately, that practice has been fairly consistent and is instrumental in addressing two issues: (1) the size of packages that can be placed in a diplomatic bag, and (2) the types of articles that will qualify "for official use" under article 27(4).

Although traditional customary international law certainly contemplated that the diplomatic bag be of a size which could be hand-carried, most states currently interpret the word "article" to include objects that can only be moved with a forklift!<sup>44</sup> The United States has unquestionably adopted this view,<sup>45</sup> and is the world's leader in the shipment of huge crates, cartons, and boxes in diplomatic bags.<sup>46</sup> By contrast, some states view such practices as incompatible with article 27(4) and have limited size of the package to pre-Vienna Convention concepts. For example, the Communist Chinese limit external size of the diplomatic bag to that of a hand-carried brief case.<sup>47</sup>

A collateral issue addresses what material may be placed in the diplomatic bag. "For official use" has not been uniformly interpreted. The United States, along with a majority of states, defines the phrase to include all *merchandise* not otherwise restricted or illegal.<sup>48</sup> "Official use" merchandise is defined to

42. Vienna Convention, *supra* note 2, art. 27(4).

43. E. DENZA, *supra* note 7, at 128.

44. M. WHITEMAN, *supra* note 16, at 220. A pouch is any "container, regardless [of] size or weight." See also E. CLARK, *supra* note 25, at 103. The diplomatic bag "can be of any size from a small package to a lorry-load [truck-load]."

45. United States Department of State, 5 Foreign Affairs Manual 300 (1973) [hereinafter 5 FAM].

46. *Id.* at 331.8.

47. L. DEMBINSKI, *supra* note 33, at 177.

48. 5 FAM, *supra* note 45.

"include any goods or commodities, regardless of size, form, or value."<sup>49</sup> Objects legitimately deemed to be "for official use" have included "documents, office supplies, furniture for the residence, spare parts for official cars, alcohol for receptions, etc."<sup>50</sup>

Some countries, primarily lesser developed ones, argue that article 27(4) of the treaty refers only to those items traditionally transported by means of the diplomatic bag. This perspective would restrict the phrase to include only "official government correspondence, documents, publications, and other materials (including but not limited to films, magnetic tapes, plastic plates, and cryptographic documents and equipment)."<sup>51</sup>

However, most of the international community has adopted the United States position.<sup>52</sup> Asserting a broad reading of article 27(4), these states steadfastly maintain that transport of large support-type items is essential to carry out diplomatic relations, and therefore meets the mandates of "for official use." Indeed, by citing apprehension over electronic surveillance and other sophisticated forms of espionage, even ordinary building materials used in construction projects on an embassy compound might qualify for shipment through the diplomatic bag.<sup>53</sup>

There are, of course, limits to this expanded interpretation. Attempts by the U.S.S.R. to use the diplomatic bag to ship vehicles has met with mixed results.<sup>54</sup> In one case focusing on size criteria, Switzerland deemed that the Vienna Convention did not allow the diplomatic bag to exceed a maximum weight of 450 pounds.<sup>55</sup> In another case involving the Russians, the Republic of Germany refused to recognize that a motorized vehicle fell within the "for official use" language.<sup>56</sup> Interesting-

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49. *Id.* at 315.7.

50. L. DEMBINSKI, *supra* note 33, at 177.

51. 5 FAM, *supra* note 45, at 332.2-1.

52. Telephone interview with Mr. Thomas Andrews, Deputy Director, Diplomatic Courier Service, United States Department of State (Nov. 20, 1990) [hereinafter Andrews].

53. Ottaway, *State Department, Congress in Embassy Row*, Wash. Post, Mar. 4, 1987, at A17, col. 2.

54. See C. ASHMAN & P. TRESCOTT, DIPLOMATIC CRIME 190-93 (1987).

55. *Id.*

56. *Id.*

ly, in that case the Germans applied type rather than size criteria.

If some disagreement exists over the legitimacy of items that can be placed in the diplomatic bag, all states nevertheless understand that prohibited items essentially conform to a list adopted by the United States State Department: "Explosives, firearms, ammunition, incendiary material, corrosives, caustics, poisons, radioactive substances, magnetic materials, liquids, illegal narcotics and dangerous drugs, . . . and any item which is illegal to import into the receiving country or export from the sending state."<sup>57</sup> Although the official position of signatories to the Vienna Convention is that such restricted items will not be imported or exported via the diplomatic bag, events have shown that states do indeed transport items in violation of the plain reading of article 27(4).<sup>58</sup> The most common infraction involves items which, while technically prohibited, are not a *malum in se* violation.<sup>59</sup> Aside from headline-grabbing exceptions, such as the discovery of a kidnapped and drugged former Nigerian official who had been sealed in a crate that was subsequently passed off as a diplomatic bag,<sup>60</sup> it is reasonable to assume that the majority of infractions are probably minor and technical in character.

As noted, the diplomatic bag also serves as a convenient vehicle by which a sending state can respond to any number of exigencies. It is not difficult to postulate certain conditions that might tempt a state to use the protection of the diplomatic bag. For example, if an embassy is located in a country which absolutely prohibits import of weapons, it is possible that the sending state might determine that emergency conditions

57. 5 FAM, *supra* note 45, at 332.4.

58. See generally C.E. WILSON, *supra* note 23. In 1958, a Belgian consul general stationed in Syria was found in Lebanon with the following items in his car: 33 submachine guns, 28 pistols, 32 revolvers, 16 hand grenades, 1,800 rounds of machine gun ammunition, 1,500 rounds of other ammunition, several time bombs, and some demolition equipment.

59. *Id.*

60. See ASHMAN & TRESCOTT, *supra* note 54, at 204-05. In 1983, Nigerian kidnappers had taken Mr. Dikko from his home in London and placed him, bound and drugged, inside of a crate which they presented to British officials at the airport as a diplomatic bag. Because of a suspicious smell emanating from the crate and because there were no diplomatic seals or marks on the crate, the crate was detained and opened.

warrant protection and defense of the embassy. A policy decision might be made to ship firearms through the diplomatic bag. Such a use of the diplomatic bag, under the given host nation's domestic law, would be a prohibited act under the treaty. However, the violation would not be without logical justification if the embassy could show, for instance, a widespread pattern of attacks on the diplomatic mission and an inability or unwillingness of the host nation to protect the embassy.<sup>61</sup>

The dogmatic judgment that a breach is a breach, regardless of magnitude or motive, is not necessarily axiomatic in light of the extremely broad language of article 27(4). While abuses of the bag to facilitate acts of aggression can never be justified, minor infractions might actually serve to alleviate conditions that would otherwise heighten conflict and strain between sending and receiving states.

While the above scenario is only hypothetical, it would be naive to believe that such infractions never occur, particularly in light of various ethnocentric domestic regulations imposed by some receiving states.<sup>62</sup> The critical question is whether such *malum prohibitum* activities on the part of the sending state nevertheless substantially comply with the overall intent of the Vienna Convention.

In drafting article 27(4), the International Law Commission recognized that the diplomatic bag had been used for transport of items other than traditional diplomatic paperwork. Indeed, addition of the word "article" to article 27(4) underscores the acknowledgment that additional equipment is necessary in modern diplomatic intercourse. Ideally, a receiving state should not institute domestic legislation that unduly restricts such items.

In the commentary to article 27(4), the Commission added: "Where, however, the articles are intended for official use, there

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61. See Kelly, *American Leadership in the Middle East*, U.S. Department of State Dispatch, Sept. 1990, at 111. With the invasion of Kuwait, the American embassy in Kuwait City remained functional despite attempts by Iraq to force it to close. With such a cut off of food and other supplies to an embassy, the diplomatic bag might be considered as a possible vehicle to bring in such items.

62. See generally S.H. AMIN, *MIDDLE EAST LEGAL SYSTEMS* (1985). As was brought to focus by the 1990 American deployment of military forces to Saudi Arabia, certain Middle Eastern countries prohibit the importation of non-Islamic literature, alcoholic beverages, and pornography.

is no objection to using the bag for transfer of currency (provided that this is not contrary to the laws or regulations of the receiving States), medals, cipher or wireless equipment or films or books . . . .<sup>63</sup> This caveat that bagged items should not violate "the laws or regulations of the receiving state" must be viewed in the light of a reasonableness standard. A receiving state that imposes unreasonably restrictive regulations, with no exceptions for foreign diplomats or diplomatic materials, should probably anticipate periodic minor infractions of those rules.

To address this dilemma, some drafters of the Vienna Convention suggested creation of a split definition based on types of items transported. Paperwork and diplomatic mail would always be treated as "for official use" and hence be absolutely protected. All other materials, however, would be subject to inspection.<sup>64</sup> This proposal was rejected by the Commission,<sup>65</sup> as were all proposals which would condition diplomatic protection on the propriety of a bag's contents.<sup>66</sup> The obvious problem is that contents can only be verified by an inspection.<sup>67</sup>

Still, universal consensus remains firm that shipment of items clearly not for official use, such as war materials to be used in aggressive and hostile activities, can never be justified. This consensus is in direct tension with the rule that confidentiality of the bag should be respected, and that even detention of a diplomatic bag gives rise to an appearance of wrongdoing incompatible with the right of free diplomatic discourse.<sup>68</sup> While an argument may be made that a state which rejects or detains a diplomatic bag runs the risk of being in breach of the Vienna Convention,<sup>69</sup> the wording of article 27 is also sufficiently broad to rebut that allegation. Unfortunately, the Commission did not incorporate a firmer set of rules clearly defining a violation.

63. Vienna Convention, *supra* note 2, art. 27(4).

64. See Eighth Report on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier, U.N. Doc. A/CN.4/417 at 57 (1988)[hereinafter 1988 ILC Report].

65. *Id.*

66. E. DENZA, *supra* note 7, at 127.

67. *Id.*

68. L. DEMBINSKI, *supra* note 33, at 178.

69. C.E. WILSON, *supra* note 23.

*E. Practical Enforcement of Article 27(3) and 27(4)*

Use of the diplomatic bag is much more extensive than the ordinary person would imagine. Its value rests not only in providing a totally secure but also a rapid means of transport, especially for large articles.<sup>70</sup> Most governments consider the diplomatic bag to be indispensable for transportation of sensitive material and thus a basic requirement of day-to-day diplomatic activities.

Because the Vienna Convention failed to be more precise, states have established through practice an expansive reading of the "for official use" language. As a result, conflicts that arise over the *practical* interpretation of article 27(4) have normally been played out at the bilateral level. A classic example occurred in early September 1986, when the Sandinista government of Nicaragua informed the United States that only 150 kilos per week and 600 kilos per month would be permitted via the diplomatic bag into the embassy in Managua. The United States, without a passing reference to the Vienna Convention, simply responded in kind to the Sandinistas' weight limitations.<sup>71</sup> Exhibiting a swiftness uncharacteristic of any bureaucratic institution, on September 8, 1986, the Department of State informed the Sandinistas: "[R]eciprocal restrictions will be implemented regarding the diplomatic pouch sent to the Nicaraguan Embassy. Effective immediately, the pouch will be limited to 150 kilos per week and 600 kilos per month."<sup>72</sup>

Obviously, the solution from the perspective of the United States was not to argue over the meaning of the broad language of article 27(4). The simple answer rested, as in most matters of international intercourse, on reciprocity. Taken to its logical conclusion, any detention of the diplomatic bag would invite retaliatory infringements between nations, especially antagonistic ones.

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70. M. WHITEMAN, *supra* note 16, at 829, 830. Then Under Secretary of State Ball noted that "hourly developments have an important bearing on our interests . . . [and furthermore] . . . an increasing volume of routine traffic is carried by hand through our pouch service."

71. Notice from United States Department of State to the Government of Nicaragua (Sept. 8, 1986) (notice of reciprocal restrictions on diplomatic pouches) [hereinafter Notice to Nicaragua].

72. *Id.*



### III. NONINTRUSIVE EXAMINATIONS OF THE DIPLOMATIC BAG

As with most treaties, subsequent unforeseen events can lead to controversy over original intent and even the plainest of verbiage. Article 27 of the Vienna Convention is no exception. With the advent of sophisticated technology, a most troubling issue has arisen over the question of *non-intrusive* examinations of the diplomatic bag: Is the use of electronic scanning in order to determine contents of the diplomatic bag consistent with language of article 27(3) that the bag shall not be "opened or detained?"

The United States has taken the position that article 27 does not prohibit electronic scanning or other non-intrusive examinations.<sup>73</sup> Many other countries and various international commentators also argue that nothing in the Convention prevents non-intrusive tests which can be performed without opening or detaining the diplomatic bag.<sup>74</sup> Britain, for example, argues that such activity is not "proscribed by a rule that [only] forbids opening . . . ."<sup>75</sup>

The United States uses remote examination for its own materials. Under limited circumstances and consistent with its own internal regulations,<sup>76</sup> such as when a diplomatic bag is to be transported by aircraft, the United States reserves the right to use electronic scanning, X-ray, and various bomb detectors on outgoing American material. Indeed, many American

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73. Andrews, *supra* note 52. But see Department of State Memorandum from the Deputy Legal Advisor for Administration (Lyerly) to the Office of Deputy Assistant Secretary for Politico-Military Affairs (Vaughan) (May 16, 1965). "[C]ommunications . . . when properly marked, will be permitted to proceed without examination of any sort." *Id.*

74. SATOW, *supra* note 8, at 117. "[A] receiving state or the airline authorities may subject a bag to detector devices . . . since this does not involve opening or detaining it . . ." *Id.*

75. L. DEMBINSKI, *supra* note 33, at 192. The next issue, however, would be to define a course of action to deal with a violation. "In any event, even if such screening was able to disclose the possibility of the misuse there would be a problem what then to do, as the United Kingdom made no such reservation . . . when it signed the treaty. So the position remains unclear and for that reason unsatisfactory."

76. 5 FAM, *supra* note 45, at 332.4.

commercial airlines will not accept luggage for transport unless it has been scanned by airport security systems.

Nevertheless, the United States has made it clear that it does not perform such remote examinations on diplomatic bags of other nations.<sup>77</sup> Officially, the United States refuses to engage in scanning because electronic examinations are regarded as threats to the security and confidentiality of the bag's contents.<sup>78</sup> However, motivation for this position probably stems primarily from the principle of reciprocity. If the United States initiated scanning procedures for foreign diplomatic bags, it could reasonably expect a response in kind<sup>79</sup> which would be unacceptable. Thus, to protect its interests as a sender of diplomatic materials via the diplomatic bag, the United States as a receiving state does not engage in scanning.<sup>80</sup> One attorney before the House of Representatives noted that "national security interests outweigh any interest the U.S. government would have in searching the pouch [diplomatic bag] of another nation."<sup>81</sup>

The United States Department of State has therefore also categorically asserted that no United States diplomatic bags may be scanned by officials of any foreign country.<sup>82</sup> Should a foreign state attempt to scan a United States diplomatic bag, the diplomatic courier is instructed to return the bag to the United States.<sup>83</sup> Furthermore, if it were discovered that a foreign nation had scanned a diplomatic bag unaccompanied by a courier, the United States would immediately issue a formal

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77. Andrews, *supra* note 52.

78. Telephone interviews with Mr. Bruce Rashkow, Assistant Legal Advisor for U.N. Affairs, Office of the Legal Advisor, United States Department of State (Nov. 20 and Dec. 13, 1990)[hereinafter Rashkow].

79. *Report to the Subcommittee on International Operations of the Committee on Foreign Affairs of the U.S. House of Representatives on Bill H.R. 3036, Revision of Diplomatic Privileges and Immunities Act*, 100th Cong., 2nd Sess. 143 (1988) (Statement of Steven J. Stein, Chairman of the Committee on International Law, Association of the Bar of the City of New York). "Any measure employed in this country against the pouch of another nation would almost certainly be employed against the U.S. pouch."

80. Rashkow, *supra* note 78.

81. Testimony before the Committee on Foreign Relations of the U.S. Senate, 100th Cong., 1st Sess. 344 (1987).

82. *Id.*

83. *Id.*

protest to that government, even though unaccompanied diplomatic bags never contain sensitive items.<sup>84</sup> Though not always reduced to writing, this policy has been adopted by all other major nations of the world community.<sup>85</sup>

Although the United States feels article 27(3) does not actually prohibit electronic scanning, some nations regard its use as a *constructive opening* and thus a breach of the Vienna Convention.<sup>86</sup> The Bulgarian Special Rapporteur at the International Law Commission stated that "any technique for finding out what is in the bag is in breach of the spirit of the Article."<sup>87</sup>

By contrast, many smaller countries which transport little by way of the bag might welcome the possibility of remote examination. Since many lesser developed states have only two missions, one in Washington and one in Moscow, they obviously have more to gain than more diplomatically active states. This argument, of course, assumes that the lesser developed nations possess the budget to purchase necessary scanning equipment.

In the final analysis, it is not necessarily true that even those nations which refuse to engage in scanning, either on practical grounds or from a belief that this would violate the Vienna Convention, have something illegal to hide. Remote electronic examination could reveal new cryptographic devices or other confidential materials which constitute legitimate state secrets. In such a case, external examination techniques might well be tantamount to an opening.<sup>88</sup> In fact, it is likely that sophisticated technology could be developed that would make it possible to read documents inside the diplomatic bag.

One proposed option requires that a receiving state first request a sending state to permit scanning of a suspicious diplomatic bag. It can be argued that this additional requirement would effectively eliminate unilateral scanning, and would be more consistent with current provisions of the Vienna Con-

84. *Id.*

85. *Id.*

86. 1988 ILC Report, *supra* note 64, at 20.

87. L. DEMBINSKI, *supra* note 33, at 192.

88. See E. DENZA, *supra* note 7, at 126-27.

vention.<sup>89</sup> The impact on the concept of inviolability would therefore be less egregious.

However, any detraction from the privileged status of the diplomatic bag necessarily renders a blow to the concept of free diplomatic communications. Any practice involving remote examination procedures could make a "serious inroad into the principle of inviolability. . . . [F]reedom of communications remains a cardinal principle in relations among nations, and notwithstanding some instances of abuse, it needs to be preserved and safeguarded in the interest of all states."<sup>90</sup>

#### IV. INTERNATIONAL LAW COMMISSION

Recognizing the need for a firmer set of universal rules to address the issues of potential abuse of the diplomatic bag and non-intrusive examinations, the international community is once again examining the possibility of creating a new protocol.<sup>91</sup> In 1986, United States Secretary of Defense Caspar Weinberger urged that the entire doctrine of diplomatic immunity be limited.<sup>92</sup> Arguing that state-sponsored terrorists were too frequently immunized by the doctrine, particularly when misuses involved smuggling of weapons, Weinberger called upon "diplomats, with the assistance of the legal profession" to define new

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89. *Id.*

90. SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 135-36 (1988).

91. 1988 ILC Report, *supra* note 64, at 10, 11. Guidance for the International Law Commission was set out in a Preliminary Report to the Fortieth Session:

It is hoped that such a comprehensive approach would reflect more adequately the significant developments that have taken place since the 1961 Vienna Convention. Diplomatic law in all its facets has acquired new forms and new dimensions because of the ever increasing dynamics of international relations in which States and international organizations are involved in very active contacts through various means. . . . The increasing number of violations of the diplomatic law, some of which have raised public concern, also warrant such a comprehensive and coherent regulation of the status of all types of official . . . bags. In this way, all means of communication for official purposes through official couriers and bags would enjoy the same degree of international legal protection.

*Id.*

92. Address by Secretary of Defense Caspar W. Weinberger, American Bar Association National Conference on Law in Relation to Terrorism (June 5, 1986) [hereinafter Weinberger Speech].

limits to help solve problems of diplomatic privileges being extended to those states connected with terrorists.<sup>93</sup>

Between 1986 and 1988, these concerns became a domestic issue within the United States. The Senate<sup>94</sup> and the House of Representatives<sup>95</sup> conducted hearings on several proposed bills addressing this issue. Special attention was focused on language of the Vienna Convention addressing the diplomatic bag.<sup>96</sup> Although none of these bills was enacted into law, the Congressional sessions provided a forum for public examination of the diverse legal and political ramifications associated with limiting privileges and immunities currently vested in the diplomatic bag.

Congressman Stephen Solarz sponsored a House of Representatives bill urging Presidential review of "the treatment accorded to diplomatic pouches [bags] under the Vienna Convention."<sup>97</sup> Solarz sought to curtail inviolability of the diplomatic bag by suggesting that, under certain circumstances involving security considerations based on probable cause, an examination of the bag would be proper.<sup>98</sup> Solarz and others eventually deferred to the State Department for evaluation of legitimate security concerns relating to the diplomatic bag.<sup>99</sup>

At the international level, as early as 1976 the United Nations General Assembly passed a formal resolution<sup>100</sup> asking the International Law Commission (Commission) to prepare a draft proposal for a protocol addressing "the status of the diplomatic courier and of the diplomatic bag not accompanied

93. *Id.*

94. *Diplomatic Crimes Legislation, 1987: Hearings on S. 969 Before the Senate Comm. on Foreign Relations*, 100th Cong., 1st Sess. 342 (1987).

95. *The Diplomatic Privileges and Immunities Act, 1988: Hearings on H.R. 3036 Before the Subcomm. on Int'l Operations of the House of Representatives Comm. on For. Affairs*, 100th Cong., 2nd Sess. 142 (1988).

96. *Id.*

97. *Id.*

98. *Thorny Issue: Peeking into a Privileged Pouch*, N.Y. Times, Aug. 1, 1988, at B6, col. 3.

99. Telephone interview with Philip Robertson, Aide to Representative Stephen Solarz, Subcommittee on Asian and Pacific Affairs (Aug. 23, 1990).

100. G.A. Res. 31/76, 31 U.N. GAOR Supp. (No. 39) at 181, U.N. Doc. A/31/39 (1976).

by a courier."<sup>101</sup> In July 1986, after lengthy discussions, the International Law Commission provided a set of draft articles to the United Nations General Assembly on the "status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier."<sup>102</sup>

These provisionally adopted draft articles contained certain bracketed portions in the text, reflecting a general inability to reach a consensus. The desire to obtain a full range of comments from the states, however, was certainly achieved. The 1986 draft contained two main provisions in regard to the diplomatic bag. Draft article 28(1) provided: "The diplomatic bag shall [be inviolable wherever it may be; it shall] not be opened or detained [and shall be exempt from examination directly or through electronic or other technical device]."<sup>103</sup> Draft article 28(2) provided:

Nevertheless, if competent authorities of the receiving [or the transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [transit] State, they may further request] that the bag be opened in their presence by an authorized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or the transit] State may require that the bag be returned to its place of origin.<sup>104</sup>

This 1986 draft of article 28(1) presented a choice for establishing the degree of protection to be given the diplomatic bag. If the first bracketed material were read into article 28(1) then the diplomatic bag would be given a clearer status, if not a greater degree of protection, than found under the current Vienna Convention. This reading could curtail the concept of

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101. *Id.*

102. 1986 ILC Report, *supra* note 3.

103. *Id.*

104. *Id.*

inviolability by providing that if a receiving state has serious reason to believe that the diplomatic bag contains prohibited items, it may request "that the bag be opened in their presence by [a] . . . representative of the sending State."<sup>105</sup> The option of sending the diplomatic bag back to the sending state is also set forth, as is the option for the receiving state to request that the bag be electronically scanned.

Should the second set of bracketed material also be included, however, the diplomatic bag would unquestionably be elevated to a status of absolute inviolability. This reading would reflect the view that the diplomatic bag should be free from any form of detention or inspection whatsoever, regardless of the circumstances. Such a definition would clearly present a tremendous obstacle to legitimate and pressing security interests of a receiving state.

As anticipated, when these draft articles were forwarded to the respective governments for observations and suggestions,<sup>106</sup> responses were as mixed as the proffered proposals. For example, some states argued that electronic scanning should be allowed only for those items "which are not intended for official use only and which heavily endanger either the public security of the receiving or transit State or the safety of individuals."<sup>107</sup> Other states simply wished to "adopt the text of paragraph 1 without brackets and to delete altogether paragraph 2."<sup>108</sup> In addition, some indicated that treatment given to consular bags under article 35(3)<sup>109</sup> should be extended to diplomatic bags.

Comments from responding states focused on five key concerns:<sup>110</sup> (1) Inviolability; (2) non-intrusive scanning; (3) need for a uniform approach to definition of all types of bags, with particular attention given to the consular bag; (4) whether uniform treatment of all types of bags, if adopted, should be governed by article 27(3) of the Vienna Convention on Diplomatic Relations, or by article 35(3) of the Consular Convention;

105. *Id.*

106. See L. DEMBINSKI, *supra* note 33, at 176.

107. 1988 ILC Report, *supra* note 64, at 59.

108. *Id.* at 60.

109. Consular Convention, *supra* note 36.

110. 1988 ILC Report, *supra* note 64, at 57.

and (5) whether a transit state should possess the same rights as a receiving state in regard to the diplomatic bag.<sup>111</sup> Comments received from world governments reflected vastly different views of a redraft of article 27.

In 1989 after extensive evaluation of these comments at its fortieth<sup>112</sup> and forty-first sessions,<sup>113</sup> the Commission presented a second reading of the draft articles to the United Nations General Assembly. The 1989 draft contains three separate options, and eliminates the brackets of the 1986 version. This second reading is still under evaluation.<sup>114</sup> Article 28 (alternative A) provides: "The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other technical devices."<sup>115</sup>

This alternative clearly elevates the diplomatic bag to a status of unquestionable inviolability, specifically restricting any attempts at remote examination. While article 27(3) of the Vienna Convention strongly suggests that the diplomatic bag enjoys complete immunity, no multilateral convention has ever used the word "inviolable" in connection with the diplomatic bag. Draft article 28 (alternative A) reflects the view that the diplomatic bag should be afforded the same status as "the archives and documents of the mission and of diplomatic correspondence."<sup>116</sup> Alternative A, then, "does not strike the necessary balance between the confidentiality of the bag and the security and other legitimate interests of the receiving state or the transit state."<sup>117</sup>

Draft article 28 (alternative B) reads:

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111. *Id.*

112. *Id.*

113. See Draft Report of the International Law Commission on the Work of its Forty-First Session, Chapter II, Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier, U.N. Doc. A/CN.4/L.435/Add. 2 (1989).

114. Telephone interview with Vladimar Kotliar, Secretary, International Law Commission, United Nations (Nov. 1, 1990). This second reading has been returned by the General Assembly to the Commission for additional study and comment. See also Andrews, *supra* note 52.

115. 1988 ILC Report, *supra* note 64, at 63.

116. *Id.* at 62.

117. *Id.*



1. The diplomatic bag shall be inviolable wherever it may be, it shall not be opened or detained and shall be exempt from examination directly or through electronic or other technical devices.

2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the consular bag contains something other than the correspondence, and documents or articles, referred to in article 25, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.<sup>118</sup>

Alternative B adds a second paragraph, wherein treatment accorded consular bags is adopted. Since the use of consular bags has become obsolete in modern international practice, this provision is blatantly nonresponsive to the issue of developing a viable option for the receiving or transit state.

Draft article 28 (alternative C) reads:

1. The diplomatic bag shall be inviolable wherever it may be, it shall not be opened or detained and shall be exempt from examination directly or through electronic or other technical devices.

2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the bag contains something other than the correspondence, and documents or articles, referred to in article 25, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.<sup>119</sup>

Alternative C of draft article 28 corresponds most closely with the first reading offered by the Commission in 1986, if the brackets are excluded.<sup>120</sup> While the receiving state would not

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118. *Id.*

119. *Id.* at 64.

120. 1986 ILC Report, *supra* note 3, art. 27(2). Article 27(2) states:

have unilateral authority to examine the diplomatic bag, it could require that the diplomatic bag be returned to its place of origin.

Because alternative C appears to establish at least some semblance of balance between protection of confidentiality of the diplomatic bag and legitimate security interests of a receiving state, it has attracted numerous supporters. In fact, it is nothing more than a compromise.

The greatest problem with this alternative is the latitude afforded a receiving state to demand inspection. This problem was duly noted during the first reading and has been subsequently noted in every debate on the matter. The Commission pointed out that "the [receiving] State's opening [of] the diplomatic bag on presumption of unlawful content of the bag might be motivated by an attempt to breach the confidentiality of the bag's content."<sup>121</sup>

Healthy skepticism of the scanning and inspection proposal embodied in alternative C is understandable. Although states "were fully conscious of the dangers of abuse . . . they were even more aware that any right of search could be abused by officials claiming to have grounds to suspect any bag which they wished to investigate."<sup>122</sup> One must therefore seriously consider whether the cure may be more harmful to the general concept of adequate diplomatic relations than the problem itself.

A consistent goal of the Commission, in all its proposals, has been to establish a set of rules reconciling the desires of a sending state to maintain absolute confidentiality of its diplomatic materials with legitimate security demands of a receiving state. This goal has not yet been realized, as evident by the

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Nevertheless, if competent authorities of the receiving [or the transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [transit] State, they may further request] that the bag be opened in their presence by an authorized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or the transit] State may require that the bag be returned to its place of origin.

*Id.*

121. *Id.*

122. SATOW, *supra* note 8.

three alternatives.<sup>123</sup> Continued inability of the Commission to set forth even a single draft clearly reflects the tremendous complexities in trying to balance these two diametrically opposed issues. The diplomatic bag is either inviolable, or it is something less.

#### V. RECIPROCITY

Perhaps the most widely publicized abuse of the diplomatic bag to date, clearly illustrating the controversy over the bag's status, was committed by the Libyan government of Colonel Qaddafi.<sup>124</sup> In April of 1984, two Libyans gunned down eleven demonstrators and one British constable as they stood outside of the Libyan Embassy in London.<sup>125</sup> Despite substantial suspicions that weapons and other evidence connected with this outright act of terrorism were put inside of Libyan diplomatic bags, British authorities allowed the Libyans to carry diplomatic bags out of the country without searching or scanning them.<sup>126</sup> Officially, Britain's position was that the Libyans and their diplomatic bags were protected by the Vienna Convention. Article 27(3) was interpreted to provide the diplomatic bag with an inviolable status.

Some commentators, however, charged that British authorities refused to search or detain the diplomatic bag to avoid further international political conflict with Libya and other radical Arab elements.<sup>127</sup> Indeed, Britain's only affirmative act was to break off diplomatic relations with Libya.

Following the incident, the Foreign Affairs Committee of the United Kingdom House of Commons conducted a detailed study of the crime and considered, among other issues, the legal protection that should be accorded the diplomatic bag.<sup>128</sup> De-

123. 1986 ILC Report, *supra* note 3, at 8.

124. It is well known that Libya has not hesitated to finance, support and even direct several acts of terrorism against various Western powers. See Green, *International Law and the Control of Terrorism*, 7 DALHOUSIE L.J. 236, 247 (1983).

125. Nordheimer, *Gunmen in London in Libyan Embassy Fire Into Crowd*, N.Y. Times, Apr. 18, 1984, at A1, col. 6.

126. Goldberg, *supra* note 1, at 4.

127. *Id.*

128. H.C. Foreign Affairs Committee, *First Report, The Abuse of Diplomatic Immunities and Privileges, Report with an Annex; Together with the Proceedings*

spite tremendous public outcry and stringent calls for amendment of the Vienna Convention to prevent recurrence of such notorious criminal acts, the committee rejected all such arguments.

Because the committee felt that protections afforded by the Vienna Convention were absolutely necessary to British diplomatic functions, it recommended that no action be taken to alter the Vienna Convention; the diplomatic bag should retain its current status of inviolability.<sup>129</sup> "In respect of all these matters we were constantly reminded of the importance of reciprocity . . . ."<sup>130</sup> The benefits of reciprocity rendered any other conclusion totally self-defeating.<sup>131</sup>

Indeed, the desire to clarify a status for the diplomatic bag must always rest upon this cornerstone of reciprocity. Nations demanding inspection of even the most suspicious diplomatic bags must do so at the risk of having their own bags subjected to the same process by the sending state.<sup>132</sup> Such practice would quickly undermine the entire concept of free diplomatic intercourse.

In the modern world, hardly a single state has not exchanged diplomats with another, each aware that its representatives will receive the same treatment given to diplomats of the other state.<sup>133</sup> The United States alone has over one hun-

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of the Committee; Minutes of Evidence Taken on 20 June and 2 and 8 July in the Last Session of Parliament, and Appendices (Dec. 12, 1984) [hereinafter H.C. Foreign Affairs Committee], quoted in, Comment, *The Abuse of the Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 AM. J. INT'L L. 641, 642, n. 5 (1985).

129. *Id.*

130. *Id.* at 650.

131. *Id.* at 651.

132. Nelson, *Opening Pandora's Box: The Status of the Diplomatic Bag in International Relations*, 12 FORDHAM INT'L L.J. 494 (1989).

133. Miller, *Terrorism and Hostage Taking: Lessons From the Iranian Crisis*, 13 RUTGERS L.J. 513 (1982). One clear illustration of the reciprocity concept exists from an incident that occurred in 1940 between the U.S. and U.S.S.R. On January 5, 1940, Soviet authorities cut off long distance phone service from the U.S. embassy in Moscow. On January 10, 1940, President Roosevelt commented to the Secretary of State "I am wondering whether we might apply the same rule to the Russian Embassy . . . ." On January 20, 1940, the American embassy's long distance service was restored. See M. WHITEMAN, *supra* note 16, at 182, 183.

dred fifty embassies throughout the world.<sup>134</sup> Regardless of the vagueness of articles 27(3) and (4), all nations understand that reciprocity is a crucial element in any discussion of the diplomatic bag. Britain understood that if it had reacted to the Libyan incident by implementing procedures to scan the diplomatic bags of other countries, British diplomatic bags would also be scanned. The only real guarantee that nations, friendly or otherwise, will adhere to international rules and comply with concepts of diplomatic immunity rests in the concept of reciprocity.

## VI. JUST A MATTER OF TIME?

It is unknown whether the United States would approach a Libyan type incident with the same "stiff upper lip" shown by the British. Crisis-oriented demands for action might very well require adoption of hastily drafted rules that could be detrimental to any reasonable form of diplomatic intercourse or other established procedures.

One example can be seen in the United States response to the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland.<sup>135</sup> Responding to public outcry, President Bush quickly appointed a bipartisan Commission on Aviation Security and Terrorism to investigate and make specific recommendations to avoid future terrorist incidents. The Commission's findings, however, underscore the need to carefully and slowly reach logical and workable conclusions.

The Commission overreacted and issued sixty detailed recommendations, many critical of established procedures and agencies. The Federal Aviation Agency, the State Department, Pan Am, and the Science Applications International Corporation (SAIC) were all singled out for criticism.<sup>136</sup> Demands for re-

134. Rashkow, *supra* note 78.

135. On December 21, 1988, a "semtex" bomb exploded on board Pan Am flight 103 over Lockerbie, Scotland. This act of terrorism resulted in the deaths of all 259 passengers and 11 persons on the ground. See *President's Panel Reports on Terrorism, Aviation Security*, 12 L. & NAT'L SEC. INTELLIGENCE REP. 6 (June 1990).

136. *Id.* at 5. The report recommended that the Federal Aviation Agency suspend plans to require airlines to spend funds on thermal neutron analysis (TNA) bomb detecting devices manufactured by SAIC. The Commission found that more technological research should be done. Pan Am was criticized for its security

forms to established procedures in all these institutions were not well received by those targeted for change. Indeed, all those targeted argued that such changes were unnecessary and, in the context of providing quality service and security, would do more harm than good.<sup>137</sup> The Commission also responded with a typical call for Congress to "enact legislation to create a position of Assistant Secretary of Transportation for Security and Intelligence."<sup>138</sup>

One can only surmise that, had the bomb been hidden in an unaccompanied diplomatic bag placed on board the aircraft, recommendations would have included abolition of the privileged status of the diplomatic bag under current article 27. Indeed, it is possible that a diplomatic bag will be used in such an incident.

This possibility, coupled with an already uncertain future status of the diplomatic bag, compels the United States to establish a concrete policy that will take into account inevitable public fervor surfacing after any headline-grabbing use of the diplomatic bag. The United States response to a state-sponsored abuse of the diplomatic bag must not be such that principles essential to open diplomatic communication are abrogated. It is clear that most abuses of the bag are not related to acts of terrorism, and many nations have probably misused the bag at one time or another. Accordingly, international and United States calls for any changes in rules that protect the bag's status must be tempered with a hard look at the overall impact of such changes on the integrity of international diplomacy and United States interests.

#### *A. Abuses of the Bag*

Illegal smuggling of "currency, jewels, watches, drugs, bombs, etc., is only one of the problems faced by customs officials when dealing with privilege-abusing diplomats. Officials

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procedures and the State Department for various aspects of its counter-terrorism initiatives.

137. *Id.* The SAIC characterized the report as being flawed. Pan Am responded that "before, during and after the crisis, we put forth every effort humanly possible." The State Department related that it was fully capable of responding to any and all known terrorist attacks.

138. *Id.*

must also police the import (in bulk lots) of propaganda supporting a rival political ideology."<sup>139</sup>

The most serious forms of misuse have certainly revolved about the business of spying. It has long been recognized that the provisions of the Vienna Convention offer perfect refuge to this type of illegal activity. "The embassy building is immune from raid or search and houses radio and cipher facilities. And the diplomatic bag provides a safe and regular means of communicating documents and the money to pay agents they recruit."<sup>140</sup> Numerous instances of misuse are matters of public record.<sup>141</sup>

Employment of the bag as a weapon of war began in the mid-1970s when it became obvious that some embassies and missions used it to smuggle various firearms.<sup>142</sup> Potential use of the diplomatic bag for acts of aggression and violence created widespread international consternation. With the unification of Germany, the depth of actual abuses is only now being realized. Revelations of such abuses of diplomatic privileges by the former East German government have been astonishing.<sup>143</sup> Abuses have included use of false diplomatic credentials and use of the diplomatic bag to smuggle weapons and currency.

Although state-supported terrorism clearly contravenes all fundamental concepts of international law,<sup>144</sup> allegations have been made that Soviet Bloc countries, as well as countries such as Libya, Iran, Iraq, Syria, and Cuba, have been active in supporting and sponsoring acts of violence against governments they wish to harm.<sup>145</sup> Since conventional warfare is deemed to be less useful, some view state-sponsored terrorism as the new *modus operandi*<sup>146</sup> for low intensity conflicts.<sup>147</sup> Indeed,

139. L. DEMBINSKI, *supra* note 33, at 192.

140. E. CLARK, *supra* note 25, at 191.

141. *Id.* at 189-91.

142. C.E. Wilson, *supra* note 23, at 137.

143. Watson, *Combatting Terrorism Teaching Update*, U.S. ARMY COMMAND AND GENERAL STAFF COLLEGE (1990).

144. See generally Murphy, *Legal Controls and the Deterrence of Terrorism: Performance and Prospects*, 13 RUTGERS L.J. 465, 491 (1982).

145. Weinberger Speech, *supra* note 92.

146. *Legislation to Combat International Terrorism: Hearings on H. Res. 223; H. Con. Res. 339; H.R. 5612; H.R. 5613; and H.R. 6311 Before the Committee on Foreign Affairs and its Subcommittees on International Security and Scientific*

if terrorism can be proven to be state-sponsored, it is an act of war. It is critical in such a case to clearly establish the linkage.

While it may be argued that one man's terrorist is another man's freedom fighter, the fact that an individual uses a diplomatic bag to commit or secrete aggressive criminal activities renders that issue moot. When the diplomatic bag is misused in such a manner, it is imperative that emphasis be placed on the criminal act, not on possible motives for the act. It is clear that the diplomatic bag, by treaty and customary international law, should not be used to facilitate open attacks on the people and property of another state. Any such use to facilitate acts of violence for ideological ends can only be categorized as a terrorist act.

### *B. Nuclear, Biological, and Chemical Abuses*

Ordinary terrorist acts pale when compared to current fears that the diplomatic bag might be used to transport weapons of mass destruction. Beyond the normal range of statesponsored terrorism that includes hijackings, bombings, and kidnappings, there looms the unthinkable threat of nuclear, biological, or chemical (NBC) terrorism. In the context of the large scale destruction that could result from even a single NBC event, demands for security safeguards would seem to far outweigh any status quo that the rules might seek to maintain, let alone calls for inviolability.

If ordinary weapons can be neatly and easily sent into the receiving state via the diplomatic bag, so can a weapon of mass destruction.<sup>148</sup> "[A]s it now stands, a hostile country could

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*Affairs and on International Operations*, 98th Cong. Sess. 33 (1984) (statement of Brian M. Jenkins, Director of the Security and Subnational Conflict Program, The Rand Corp.).

147. Dep't of Army & Dep't of Air Force, *FIELD MANUAL 100-20, MILITARY OPERATIONS IN LOW INTENSITY CONFLICT* 14 (Dec. 1989). The term "low intensity conflict" is defined as:

Political-military confrontation between contending states or groups below conventional war and above the routine, peaceful competition among states. It frequently involves protracted struggles of competing principles and ideologies. Low intensity conflict ranges from subversion to the use of armed force. It is waged by a combination of means, employing political, economic, informational, and military instruments. Low intensity conflicts are often localized, generally in the Third World, but contain certain regional and global security implications.

*Id.*

148. Some commentators argue that a terrorist group would never use such



smuggle in an atomic bomb, piece by piece, then reassemble it for use when desired."<sup>149</sup> Of course, with the current interpretation of article 27(4) as to size of diplomatic bags, the entire weapon could probably be passed through a single diplomatic bag.

The central argument of those who desire a restriction on privileges associated with the diplomatic bag rests with the specter of an act that would cause us all to "go up in smoke since diplomatic bags could be used to secrete [nuclear] weapons."<sup>150</sup> Such arguments appeal to emotion rather than to intellect; nevertheless, they are compelling. Debasing the privileged status of the diplomatic bag, however, is not the answer for two reasons.

First, a determined terrorist will find yet another way to smuggle weapons. Second, since nations have an inherent right of self-defense to search out and otherwise protect themselves against viable threats to their national security, the state sponsoring such blatant aggressive behavior takes an inordinate risk by using the diplomatic bag in such a manner.<sup>151</sup> It is one thing for a diplomat to smuggle drugs for his own profit; it is quite another to use the bag to ship illegal weapons designed for aggressive acts.

It is impossible that restrictions on the use of the diplomatic bag will eliminate such an event. In an open society such as the United States, the state-sponsored terrorist need not rely on the bag. Necessary materials can be obtained on the domestic open market and, more importantly, will not leave a "signature" that can be traced. Given the concept of reciprocity, elimination of current protections will hurt the open society more than the terrorist and his sponsors.

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weapons, since world opinion would condemn them. It is also thought that the primary utility of such weapons is to threaten, not to actually detonate. See Wilder, *International Terrorism and Hostage Taking: An Overview*, 11 MANITOBA L.J. 367, 372-73 (1981).

149. C.E. WILSON, *supra* note 23, at 137, 138.

150. Goldberg, *supra* note 1, at 4.

151. See *Rose v. King*, 3 D.L.R. 618, 646-47 (Quebec, King's Bench, Appeal Side 1947) cited in 7 M. Whiteman, *supra* note 16, at 181: "Before granting or recognizing a privilege to another State, a State has the right to accord to itself a first privilege, that of its own security."

## VII. A PROPOSAL FOR A UNITED STATES POSITION

A. *Cost-Benefit Analysis*

A primary obligation of any state is to protect its citizens from external as well as internal harm. Formulation of a United States position regarding the International Law Commission's latest set of alternatives for draft article 28 must take into account the occasional abuse of the diplomatic bag. However, a greater consideration lies with the possibility that the United States might lose an essential vehicle for shipping confidential articles into foreign nations.

While abuses of the diplomatic bag are likely to continue, it is unlikely that the bag will be used in an NBC event. The principle cost of the bag's protected status is in the realm of espionage and an occasional spectacular abuse such as that sustained by the British in the 1984 Libyan incident. It is also obvious that the diplomatic bag is a critical tool in carrying out United States foreign policy, and this benefit rests primarily on the concept of inviolability.

Instead of arguing for a weaker status for the diplomatic bag, the United States must demand that the current status set out in articles 27(3) and (4) be strengthened. There must be no doubt that the diplomatic bag is inviolable. The United States should unequivocally endorse draft article 28 (alternative A), rendering the diplomatic bag absolutely inviolable wherever it may be.

Those attracted to draft article 28 (alternative C), because it offers a "reimplementation of what was the customary international practice with regard to the diplomatic bag [by] introduc[ing] the most appropriate balance between the opposing interests of the sending and receiving states"<sup>152</sup> fail to appreciate the tremendous negative impact such a rule would have on United States interests. While it may be that alternative C "augments the sending and receiving states' common interest in tranquil and efficient foreign relations,"<sup>153</sup> such an analysis furthers the international perspective, not the United States perspective.

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152. Nelson, *supra* note 132, at 520.

153. *Id.*

Since the United States has established diplomatic missions in almost every nation in the world and is by far the greatest sender of the diplomatic bag,<sup>154</sup> it is reasonable that the United States should support the continued privileged status of the diplomatic bag and reject any efforts to scan or search it. The fact that the United States also receives more incoming diplomatic communications than any nation<sup>155</sup> does not outweigh the need to have a protected means to transport diplomatic materials throughout the world. Just as the British concluded that the need for a protected diplomatic bag outweighed terrorist abuses, the United States must reach the same conclusion.

Those who argue that abuses of the diplomatic bag cannot be ignored have failed to weigh the most critical balancing factor of all—United States interests in having an inviolable instrument. The price of this inviolability is tolerance of occasional abuses; the fulcrum must still shift towards the overriding need for a truly inviolable diplomatic bag.

#### *B. Dealing With the Abuser of the Diplomatic Bag*

An alternative method for dealing with a known state-supported terrorist abuse of the diplomatic bag is to seek redress financially, judicially, or militarily.<sup>156</sup> If a criminal commits a crime with a gun, the objective person does not seek revocation of the constitutional right to bear arms;<sup>157</sup> he demands that the criminal be punished. Likewise, if a state uses the diplomatic bag to commit acts of violence, one should not call for the elimination of fundamental diplomatic privileges; rather, he should demand that the renegade state be punished in a legitimate forum. The central focus then shifts to discovering an appropriate forum for punishment of the abuser.

One very valid criticism of international law is that all dispute resolution requires involvement of some third party. This criticism is particularly appropriate when examining

154. Andrews, *supra* note 52.

155. *Id.* The United Nations is headquartered in New York. In addition, Washington is host to more foreign missions than any other nation in the world.

156. A prime example of the use of force to counter state-sponsored terrorism occurred on April 14, 1986 when the United States conducted bombing strikes on various targets in Libya. This was in response to the Libyan ordered bombing of a discotheque in West Berlin on April 5, 1986.

157. U.S. CONST. amend. II.

abuses of the diplomatic bag. Certainly, however, legitimate and effective tools exist under customary international law that can permit punishment of an abuser of the diplomatic bag on a unilateral basis.

First, an aggrieved state could rely on the classical concept of retorsion, taking all those legal acts necessary to exhibit its disapproval of the offending state. Actions could include recall of diplomatic personnel from the offending state or expulsion of diplomatic personnel of the offending state. Additionally, the aggrieved state could implement acts of sequestration such as economic, social, or political sanctions against the offending state.

Second, an aggrieved state could certainly suspend portions of the Vienna Convention in order to respond to the illegal behavior. If the breach by the offending state could be categorized as a material breach, such a suspension would be entirely consistent with international norms.

Finally, the aggrieved state could turn to classical forms of self-defense, depending on the severity of the abuse. Realistically, if authorities of a receiving state had hard evidence that a diplomatic bag was used to transport objects clearly *malum in se*, it is reasonable to assume that this aggrieved state would make a policy decision to search the diplomatic bag. Under traditional notions of self-defense and forcible self-help, a national entity will do what is necessary to protect itself from acts of violence.<sup>158</sup> In this context, if an abuse were discovered, the classical right to engage in an act of reprisal, taking an action that would otherwise be illegal, might be appropriate. This option would be of fundamental value if the abuse had led to an act of violence. The aggrieved state would, of course, have to meet the basic criteria associated with an act of reprisal: (1) the response must be proportionate to that complained of; (2) the reprisal must be timely; (3) the reprisal cannot be directed

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158. The right of a country to engage in acts of self-defense is well known in international law. The famous Caroline Doctrine, which defines the circumstances that permit forcible self-help, grew out of an 1837 raid by Canadian troops into New York. In response, Secretary of State Daniel Webster set down the rules for such acts of self-defense. He indicated that a nation may resort to necessary and proportional acts of self-defense if such acts arise out of an instant and overwhelming necessity, leaving no choice of means and no moment of deliberation. See McHugh, *Forcible Self-Help In International Law*, 25 NAVAL WAR COLLEGE REV. 61 (1972).

against a protected category of persons; and (4) approval must come from the highest levels of authority (United States policy).<sup>159</sup>

Amending rules that pertain to the diplomatic bag will not enhance the nationalistic right of self-defense,<sup>160</sup> but will only serve to hinder diplomatic communications. The aggrieved state need not rely on an international forum to formulate a response; the necessary tools already rest in customary principles.

### VIII. CONCLUSION

The United States, above all nations, must remember that laws are made for general application and not for exceptions. Sporadic abuses of the diplomatic bag must not be allowed to cause abandonment of a longstanding and necessary tool, used in performance of diplomatic relations and the carrying out of other national interests. Freedom of communication remains a cardinal principle in relations among nations which must be preserved and safeguarded, notwithstanding occasional abuse.

At a minimum, the diplomatic bag must be protected under current standards of sections (3) and (4) of article 27 of the Vienna Convention on Diplomatic Relations. Proposals for scanning, searching or detaining the diplomatic bag have been rejected before by member states to the convention.<sup>161</sup> The United States must lead the way to ensure that they are rejected once more. At a time when the United Nations is debating backing away from an inviolable status for the diplomatic bag, the United States must lead the way not only in reaffirming the current rules, but also in establishing a standard of complete inviolability.

There is great wisdom in the simple axiom that "one good reason is always enough." In applying a cost-benefit analysis to

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159. Dep't of Army, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 497 (July 1956).

160. A "public safety" exception was briefly proposed by the State Department in the aftermath of the search of the Nicaraguan Ambassador's residence by American troops during the 1989-90 Panama Campaign. The proposal that there was a customary exception to the Vienna Convention based on a public safety theory was quickly discarded and the official U.S. position was based on a mistake of fact concept. See G. Walsh, *Executive Summary: Just Cause After-Action Seminar*, JUDGE ADVOCATE GENERAL'S SCHOOL 11 (1990).

161. E. DENZA, *supra* note 7, at 127.

the diplomatic bag, that one good reason is the need for an inviolable instrument with which to carry out foreign policy. When the three alternatives offered by the International Law Commission are considered against the critical importance that the inviolable diplomatic bag has in enabling the United States to carry out its diplomatic functions, the answer is fundamentally obvious. Article 28 (alternative A) offers the greatest advantage to the nation.

The United States response to abuse of the diplomatic bag should rest in unilateral action based upon customary principles. Accordingly, the United States should formulate contingency plans based on this approach before the next serious abuse is discovered. In order to avoid a situation like the British reaction to the Libyan incident, it is critical to stand ready. If necessary and appropriate responses are not created now, it is certain that the issue of inviolability will remain, at best, inexorably clouded.